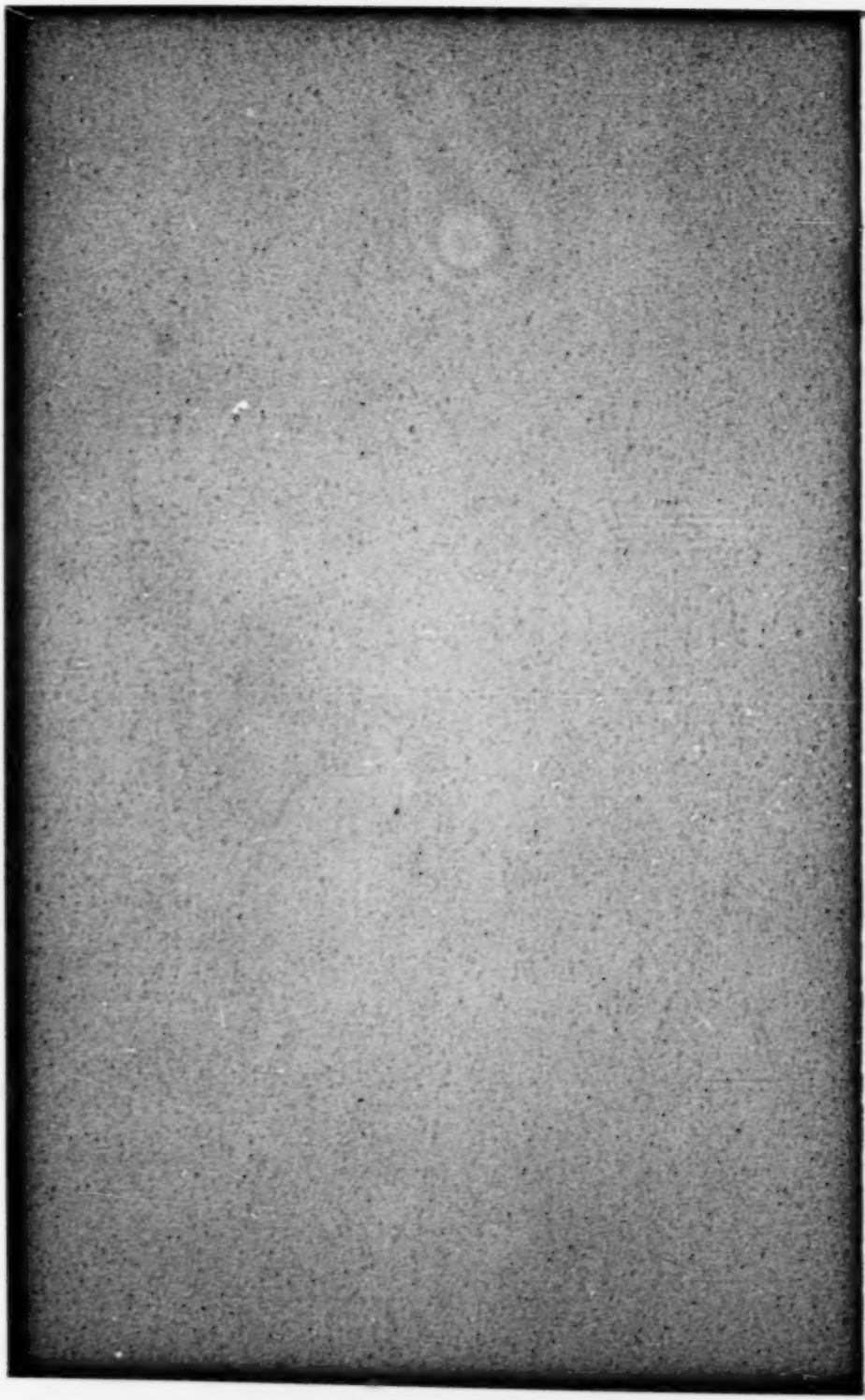

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1885.

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT
(On Property of Penn Central Company),
683 Board Street, Columbus, Ohio,

Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1885.

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT
(ON PROPERTY OF PENN CENTRAL COMPANY),
683 BOARD STREET, COLUMBUS, OHIO,
Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. AND WILLARD WIRTZ,
TRUSTEES OF THE PROPERTY OF
PENN CENTRAL TRANSPORTATION COMPANY,
DEBTOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINION BELOW.

The opinion below has not been officially reported. It is unofficially reported at 85 L.R.R.M. 2526, and at 73 Labor Cases (CCH) ¶14,336.

QUESTION PRESENTED.

Whether the Court of Appeals applied the proper legal standard in holding that the dispute (concerning maintenance of certain "crew boards") which had arisen in this case was a dispute as to the interpretation or application of a collective agreement entered into under the Railway Labor Act, that is to say a "minor" dispute; and in concluding that the District Court had no jurisdiction to issue a permanent injunction against an alleged violation of the agreement.

STATEMENT OF THE CASE.

The material facts of the case are succinctly stated in the opinion of the Court of Appeals (Petition, Appendix A at pages 2a-4a).

ARGUMENT.

Petitioner urges this Court to exercise its discretion under Rule 19 to issue a writ of certiorari in the present case, based on the assertion of a direct conflict between the decision in this case and that of the Court of Appeals for the Sixth Circuit in *United Transportation Union, Local 63E v. Penn Central Company,* 443 F.2d 131 (1971), cert. den. 404 U.S. 938.

It is true that the Seventh Circuit refused to follow the decision of the Sixth Circuit in a "crew board" case which was similar on its facts, although Respondents feel there are substantial differences in the agreements involved in the two cases, which will be briefly discussed later. Indeed, these Respondents sought review of the Sixth Circuit case in 1971 on the ground, among others, that that decision was contrary to established law in the Seventh and other Circuits. No. 71-266, certiorari denied, 404 U.S. 938.

However, any conflict involving a principle of law between the two "crew board" cases has been obviated by a subsequent decision of the Sixth Circuit. In *Local 1471, United Transportation Union v. Baker,* 482 F.2d 228 (1973), an action to enjoin an alleged violation of a railroad collective agreement, the Sixth Circuit adopted the following legal test as to whether the dispute before it was to be classified as "major" or "minor", at page 230:

> "However, difficulty arises when, as in this case, one party views the controversy as a dispute over the proper interpretation of the existing contract and agreed rules, while the other charges its adversary with an attempt to impose unilaterally a new requirement that changes the existing agreement. Confronted by such opposing characterization of particular disputes, the courts of appeals have consistently ruled that if

the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is within the exclusive province of the National Railroad Adjustment Board. Railway Express Agency v. Brotherhood of Railway, Airline and Steamship Clerks, 5th Cir. 1971, 459 F.2d 226, 231, cert. denied 409 U.S. 892, 93 S. Ct. 115, 34 L. Ed. 2d 149 ('arguable'); Switchmen's Union v. Southern Pacific Co., 9th Cir. 1968, 398 F.2d 443, 447 ('arguably predicated on the terms of the agreement'); Airline Stewards Assn. v. Caribbean Atlantic Airlines, Inc., 1st Cir. 1969, 412 F.2d 289, 291 (not 'obviously insubstantial'); Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, 1967, 127 U.S. App. D.C. 371, 384 F.2d 323, 327 (not 'obviously insubstantial'). In our view, the concept expressed in these formulations is sound. We apply it to this case."

In support of this most recent holding, as may be noted, the Sixth Circuit relied on three of the same cases (those from the First, Ninth and District of Columbia Circuits) as were relied on by the Seventh Circuit in the decision here appealed from, namely *Airline Stewards Association v. Caribbean Atlantic Airlines, Southern Railway Company v. Brotherhood of Locomotive Firemen and Enginemen,* and *Switchmen's Union v. Southern Pacific Company.* In addition, the Sixth Circuit relied upon a similar case from the Fifth Circuit, *Railway Express Agency v. Brotherhood of Railway, Airline, and Steamship Clerks.* All these cases are cited in the preceding quotation.

The result is that the principles of law as applied by the Sixth Circuit have been brought into harmony with those applied by the Seventh Circuit in the present case,

and by other circuits referred to. Any apparent conflict as to applicable legal principles between the two "crew board" cases has thus been obviated.

Respondents further suggest that there is a substantial difference between the facts of the two cases, even though Petitioner contends, and the Seventh Circuit admittedly stated, that they were "in all relevant aspects identical". Notwithstanding these statements, the collective agreement in question in the Seventh Circuit case contained a provision respecting crew boards which differs substantially from that in the Sixth Circuit case.

The applicable contractual provision applying to firemen in the Sixth Circuit case was as follows:

> "5-B-2. Crew boards (h). Crew boards showing the order in which crews are to go out will be maintained. Boards of regular and extra hostlers will also be maintained." 443 F.2d 132

The relevant provision applying to trainmen in the Seventh Circuit case was as follows:

> "8-B-1. Crew boards. Crew boards showing the order in which crews are to go out shall be maintained. At outlying points where a crew board attendant is not on duty throughout an entire calendar day, arrangements shall be made so that trainmen desiring information as to their standing on the crew shall be furnished such information." Petition, Appendix A, pp. 2a-3a.

The second sentence of the rule 8-B-1 just quoted obviously gives the railroad greater latitude than rule 5-B-2 first quoted with respect to making arrangements other than crew boards to keep trainmen advised of their standing where no crew board attendant is on duty. Thus rule 8-B-1 offered a strong basis for the Seventh Circuit's deci-

sion accepting the railroad's position that only a dispute as to an application of this provision was involved, and holding that the railroad's position was not frivolous or wholly without basis. The different result in the two decisions can be explained, not as a conflict of legal principles, but as a difference in the manner in which the respective Courts of Appeal evaluated the facts of the cases before them.

Be that as it may, in view of the later decision of the Sixth Circuit, it is obvious that the Sixth Circuit itself has limited its earlier holding to the facts there involved, and that the Sixth Circuit finds itself in accord with the established law as applied by the Seventh Circuit in the case here under appeal.

Respondents have referred to the reliance by both the Sixth and Seventh Circuits on similar holdings in the First, Ninth, and District of Columbia Circuits. The Court's attention is further called to the fact that similar principles have been followed in other Circuits in the following cases: *Gainey v. Brotherhood of Railway and Steamship Clerks,* 275 F.2d 342 (3d Cir., 1960); *Hudie v. Aliquippa and Southern R.R.,* 360 F.2d 213 (3d Cir., 1966); *Switchmen's Union v. Central of Georgia Railroad,* 341 F.2d 213 (5th Cir., 1965), cert. den. 382 U.S. 841; *United Transportation Union v. Burlington Northern, Inc.,* 458 F.2d 354 (8th Cir., 1972).

Petitioner argues briefly that aside from the alleged conflict between the circuits, the decision below threatens to "destroy" the status quo provisions of the Railway Labor Act. It is asserted that the decision below means that the courts cannot "make some initial evaluation of the facts to determine whether the [railroad's] defense is in fact frivolous or substantial." Petition pg. 12-13. Of course the Court of Appeals made no such ruling. It did examine the facts of record and determined that the rail-

road had a substantial basis for its position that the dispute presented was a "minor dispute".

It justly refused to follow the path taken by the District Court (and affirmed by the Sixth Circuit) in the earlier crew board case of applying the existing agreement to the facts in the case and then proceeding to decide the merits of the minor dispute. Petitioner agrees that such a procedure is wrong. "It is well understood that the courts must not undertake to interpret the agreement." Petition, pg. 14. "The Courts have no jurisdiction to enjoin a change in the status quo in a minor dispute situation." Petition, pg. 10.

The "status quo" provisions of the Railway Labor Act, Section 6 in particular, 45 U.S.C. § 156, are not involved in grievance situations and would have no relevance in a "minor dispute" until such time as an adjustment board of competent jurisdiction had decided that the railroad had violated the collective agreement. *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946), at page 565; *Detroit, Toledo and Shore Line RR v. United Transportation Union,* 396 U.S. 142 (1969), see especially pages 156-157, where the Court comments on *Pitney.*

Petitioner's concern for Section 6 of the act is consistent with its assumption, which has been made from the beginning of the case, that the union was correct in its position as to the meaning of the collective agreement, and that therefore the railroad was "changing" the agreement. All that has happened here is that the Court of Appeals found that the basic contractual dispute was for the adjustment boards, not the courts, a proposition which has been repeatedly emphasized by this Court. *Slocum v. Delaware Lackawana and Western RR,* 339 U.S. 239 (1950); *Pennsylvania RR v. Day,* 360 U.S. 548 (1959); *Union Pacific RR v. Price,* 360 U.S. 601 (1959); *Andrew v. Louisville and Nashville RR,* 406 U.S. 320 (1972).

CONCLUSION.

The decision of the Court of Appeals is not in conflict with the law as stated by the Court of Appeals for the Sixth Circuit, in view of the fact that the Sixth Circuit has adopted similar legal principles in a case subsequent to that with which the conflict is asserted to exist. The decision below represents an application of widely followed principles to the facts of a particular case. Therefore, Respondents urge that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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